



STATE OF NEVADA

BEFORE THE NEVADA COMMISSION ON ETHICS

**In the Matter of the
Request for Opinion concerning
the conduct of ERNEST C. SCHANK,
President, Board of Directors
Truckee Carson Irrigation District
Churchill County, State of Nevada.**

Request for Opinion No.: 07-46C

EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION REGARDING JUST AND SUFFICIENT CAUSE

The following is the Executive Director's recommendation based on the Investigator's report (TAB A).

While acting as president of the Board of Directors (Board) of the Truckee Carson Irrigation District (TCID), Ernest C. Schank (Schank) is alleged to have acted upon a matter in which Schank had a conflict of interest. Schank participated in Board discussions on a water usage discrepancy related to irrigation water delivered to Carlon Dodge (Dodge). Before this matter came before the Board, Dodge's water usage was measured through a device located after a pond/reservoir situated on property owned by Shank's mother-in-law (Sorensen). An easement owned by Dodge allows him to store irrigation water in the pond and convey the water across Sorensen's property through a delivery ditch. The Board decided to change the point at which Dodge's water usage is measured to a device located before the pond. Schank allegedly guided the Board to its decision despite his alleged conflict of interest due to his relationship with Sorensen.

Schank allegedly violated:

- NRS 281A.400.9 when he influenced the Board to support the TCID project manager's position on seepage calculations and procedure of charging for water.
- NRS 281A.420.2 when he guided the board during its discussion of this matter notwithstanding his relationship to Sorensen.
- NRS 281A.420.4 by not disclosing his relationship with Sorensen.

A. JURISDICTION:

In his capacity as president of the TCID Board, Shank is a public officer as defined by NRS 281A.160. As such, the Nevada Commission on Ethics has jurisdiction over this complaint.

Schank submitted a *Waiver of Statutory Time Requirement* form on November 15, 2007.

B. RELEVANT STATUTES:

NRS 281A.160 “Public officer” defined.¹

NRS 281A.400 General requirements; exceptions.²

NRS 281A.420 Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum . . .³

¹ 1. “Public officer” means a person elected . . . to a position which is established by . . . a statute of this State . . . which involves the exercise of a public power, trust or duty.

² A code of ethical standards is hereby established to govern the conduct of public officers and employees:

9. A public officer or employee shall not attempt to benefit his personal or financial interest through the influence of a subordinate.

³ 1. Except as otherwise provided in subsection 2 or 4, a public officer may vote upon a matter if the benefit or detriment accruing to him as a result of the decision either individually or in a representative capacity as a member of a general business, profession, occupation or group is not greater than that accruing to any other member of the general business, profession, occupation or group.

2. . . . [I]n addition to the requirements of the code of ethical standards, a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

(b) His pecuniary interest; or

(c) His commitment in a private capacity to the interests of others.

➤ It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his pecuniary interest or his commitment in a private capacity to the interests of others where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed in a private capacity is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the pecuniary interest or commitment in a private capacity to the interests of others.

4. A public officer or employee shall not approve, disapprove, vote, abstain from voting or otherwise act upon any matter:

(b) Which would reasonably be affected by his commitment in a private capacity to the interest of others; or

(c) In which he has a pecuniary interest,

➤ without disclosing sufficient information concerning the . . . commitment or interest to inform the public of the potential effect of the action or abstention . . . upon the person to whom he has a commitment, or upon his interest. . . . [S]uch a disclosure must be made at the time the matter is considered. If the officer . . . is a member of a body which makes decisions, he shall make the disclosure in public to the . . . other members of the body.

8. As used in this section, “commitment in a private capacity to the interests of others” means a commitment to a person:

(a) Who is a member of his household;

(b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;

(c) Who employs him or a member of his household;

(d) With whom he has a substantial and continuing business relationship; or

(e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

C. RECOMMENDATION:

On the issue of his influencing the Board to support the TCID project manager's position on seepage calculations and procedure of charging for water, sufficient credible evidence does not support a finding that Schank violated the provisions of NRS 281A.400.9. As board president, Schank guided the board through its discussion and deliberations on this matter, but never influenced any subordinates in an attempt to benefit his personal or financial interest. It is recommended that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of NRS 281A.400.9.

On the issue of disclosure and abstention, sufficient credible evidence does not support a finding that Schank violated the provisions of NRS 281A.420.2 and NRS 281A.420.4. No greater benefit or detriment accrued to Schank or Sorensen from his participation in this matter. His independence of judgment was not materially affected by his pecuniary interest or his commitment in a private capacity to the interests of Sorensen. The Board's decision to uphold the seepage calculations and charging procedure established by the TCID project manager had nothing to do with Schank's relationship to or interest in Sorensen. It is recommended that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to these provisions.

D. SUMMARY OF REQUEST FOR OPINION (COMPLAINT):

On November 1, 2007, a Request for Opinion (complaint) was received from Dodge. The following is the substance of the allegations:

At the September 7, 2007 TCID Board of Directors meeting, Schank guided the board to uphold the seepage calculations and water charging procedure established by the project manager. Schank convinced the board to support the project manager and disregarded the TCID Operation and Maintenance (O & M) Committee recommendations.

Sorensen is Schank's mother-in-law and the owner of the property on which Dodge has an easement to access a pond for irrigation water. Schank advised the board that TCID can deliver water to Dodge without the use of the pond. Schank is using this opportunity to convince the TCID to have the pond removed, so Sorensen can use the land for alternative purposes.

E. SUMMARY OF SUBJECT'S RESPONSE:

On December 4, 2007, Schank submitted the Subject's Response to the complaint. The following is a summary of his response:

While performing an audit of water deliveries related to a subpoena issued by the United States Attorney for Nevada, the TCID project manager found a discrepancy in the measurement of water volume being delivered into a private delivery ditch which supplies Dodge's ranch. It was found that the method being used to charge Dodge did not take into account the real volume of water delivered to Dodge's ranch and was not consistent with other measurement stations within the TCID.

SUMMARY OF SUBJECT'S RESPONSE (CONTINUED)

The project manager informed Dodge that TCID would begin to measure his deliveries with the appropriate measurement device. TCID has the responsibility of installing water measurement devices to measure quantities of water delivered to the head gates of water users throughout the Newlands Project. The measurement device for Dodge's delivery ditch was installed in 2001. The District has installed 80 meters and is using them to charge water. General protocol is that if there is some distance from the measurement device to the water user's property line, and then a loss is calculated and deducted. Once the water meets the user's property all losses are the user's responsibility.

Dodge did not agree with the seepage calculation and water charging procedure, so the project manager referred the matter to the O & M Committee. The committee reviewed the matter and recommended not to sustain the project manager's decision.

The Dodge measurement issue was on the September 7, 2007 Board agenda as part of the O & M Committee report. Dodge was notified of the board meeting but did not attend.

During the discussion, the project manager made it clear that this issue is about where the measurement should take place. He also stated that the pond is not part of the TCID delivery system, but is on private property on which Dodge has an easement to use for delivery of his water. The O & M Committee's recommendations were given to each of the board members prior to the meeting for their review. There was no effort on Schank's part to suppress the committee's recommendations.

At no time did Schank express that water could be delivered without the use of the pond. Schank has no interest financially in the present or in the future to the land upon which Dodge's private delivery system passes. At no time in the discussion did Schank state a case to have the pond removed so that Sorensen could use the land for alternative purposes.

Schank stated that it is his right as the board president to give guidance regarding the options to be considered by the board. In this matter, he generally outlined that the board could either take action to sustain the project managers findings, endorse the O & M Committee's recommendation, or take no action, which would have the effect of sustaining the project manager's findings and recommendations. The project manager asked the Board to take an action.

As President, Schank cannot make motions and he did not in this case. He simply clarified the options available to the board. The motion was made and seconded to sustain the project manager's findings. All Board members present, including Schank, voted unanimously to support the motion.

Schank holds no authority or power over any board members. As president of the board, he has authority to speak on behalf of the TCID in matters as directed by the majority vote of the board.

SUMMARY OF SUBJECT'S RESPONSE (CONTINUED)

The project manager is hired by the entire Board and is not subject to the control by any one Board member. He carries out policy established by majority vote of the Board. In this particular case, the project manager's decision was in performance of his duties to measure water accurately. At no time did Schank attempt to influence the project manager's decision before it was presented to the Board.

Schank has no pecuniary interest or commitment in any private capacity to Sorensen's interest regarding the amount of water delivered to Dodge. Dodge is being treated the same as any other farmer in the system as to how water usage is measured. The issue of the delivery system after it passes through the measuring device was not relevant to the motion and discussion other than that Dodge had made an issue of the pond in his discussion before the O & M Committee. During the Board discussion, it was made clear that neither Dodge's delivery system nor his easement over Sorensen's land would be affected. Schank's judgment in this matter was never to take away any of Dodge's rights. The Board treated Dodge's delivery of water on an equal basis with all others in the TCID.

Everyone present at the meeting was aware that Sorensen owns the easement and private property through which the Dodge delivery system passes. They are also aware of Schank's relationship to Sorensen. Neither Schank nor Sorensen benefit from the amount of water charged to Dodge.

F. INVESTIGATIVE ACTIVITIES:

The investigator:

- Received *Waiver of Statutory Time Requirement* form on November 15, 2007 (**TAB A**).
- Reviewed Request for Opinion (complaint) and a letter dated October 10, 2007 from Dodge's attorney to the TCID Board requesting the Board to reconsider the action taken at its September 7, 2007 meeting. Copies of the following were included (**TAB B**):
 - Indenture, dated August 28, 1928 conveying land and easement to access reservoir/pond.
 - Excerpt of the TCID policy and procedure for delivery and measurement of water; page four of the TCID summer 2007 *Lahontan Times* newsletter explaining the policy protocol.
 - Letters dated July 16 and August 1, 2007 from TCID project manager to Dodge regarding seepage calculations and water charges.
 - Memorandum dated August 23, 2007, with attachments, from Dodge's attorney to the TCID O & M committee summarizing the issues for the committee's meeting held on August 23, 2007.
 - Notes for the TCID O & M committee meeting including water usage discrepancy and summary reports.
 - Letter dated August 30, 2007 from Dodge's attorney to the TCID O & M committee regarding the committee's meeting held on August 23, 2007.

INVESTIGATIVE ACTIVITIES (CONTINUED)

- Audio recordings of the August 23, 2007 O & M committee meeting and the September 7, 2007 Board meeting.
- Agenda of the September 7, 2007 TCID Board meeting.
- Letter dated September 11, 2007 from TCID project manager to Dodge regarding seepage calculations and charging procedure as determined at the September 7, 2007 TCID Board meeting.
- Reviewed the Subject's Response, including copies of the following (**TAB C**):
 - Excerpt of the contract between the federal government and TCID providing for the operation and maintenance of the Newlands Project.
 - Letter dated September 11, 2007 from TCID project manager to Dodge referenced above.
 - Letter dated September 27, 2007, with attachments, from Dodge's attorney to the Nevada Attorney General filing an Open Meeting Law complaint regarding the August 23, 2007 O & M committee meeting and the September 7, 2007 Board meeting.
 - Letter dated October 9, 2007 from Schank to the Nevada Attorney General in response to the Open Meeting Law complaint.
 - Letter dated October 18, 2007 from Schank to Dodge stating that the action taken by the TCID Board at its September 7, 2007 is final, subject to the outcome of the Attorney General's investigation regarding the Open Meeting Law complaint.

The investigator researched the following:

- Minutes of the August 23, 2007 O & M committee meeting and the September 7, 2007 Board meeting (**TAB D**).
- TCID website regarding the Board, committees, purpose, operating criteria and procedures of the TCID, water rights, summer 2007 *Lahontan Times* newsletter; NRS 539 – Irrigation Districts (**TAB E**).

G. CONCLUSION AND RECOMMENDATION:

On the issue of his influencing the TCID Board to support the project manager's position on seepage calculations and procedure of charging for water, the conclusion is that as Board president, Schank guided the Board through discussion and deliberations in this matter. He never influenced any subordinates in an attempt to benefit his personal or financial interest. It is recommended that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of NRS 281A.400.9.

On the issue of disclosure and abstention, sufficient credible evidence does not support a finding that Schank violated the provisions of NRS 281A.420.2 and NRS 281A.420.4. The conclusion is that no greater benefit accrued to Schank or Sorensen from his participation in this matter.

CONCLUSION AND RECOMMENDATION (CONTINUED)

Schank's independence of judgment was not materially affected by his pecuniary interest or his commitment in a private capacity to the interests of Sorensen. The Board's decision to uphold the seepage calculations and charging procedure established by the TCID project manager had nothing to do with Schank's relationship to or interest in Sorensen. It is recommended that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to these provisions.

It is recommended that the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hold a hearing and render an opinion in this matter relating to the provisions of NRS 281A.400.9, NRS 281A.420.2 or NRS 281A.420.4.

REPORT PREPARED BY:

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APPROVAL AND RECOMMENDATION BY:

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